OCT 3 1994

No. 94-32

IN THE
Supreme Court of the United States
October Term, 1994

ALLSTATE INSURANCE COMPANY,
Petitioner,

v.

FRANK S. DEUS AND

VOORHIES & LABBÉ,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

W. GERALD GAUDET
JOHN CRAIG JONES*
VOORHIES & LABBÉ
700 St. John Street
P.O. Box 3527
Lafayette, LA 70502
(318) 232-9700
Attorneys for Respondent

*Counsel of Record

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STATEMENT OF THE CASE

On August 15, 1988, Frank Deus ("Deus"), a Louisiana citizen, filed suit against Allstate Insurance Company ("Allstate"), an Illinois citizen, in the U.S. district court for the western district of Louisiana invoking diversity jurisdiction under 28 U.S.C. § 1332. On the same day, Deus filed suit against Allstate in the Fifteenth Judicial District Court, Lafayette Parish, Louisiana. (Appendix of Original Petition at 6a.) Deus did not serve the state court petition but instead proceeded to litigate his federal court action in the U.S. district court. (Appendix of Original Petition at 6a-7a.)

More than three months before trial in the district court, Deus moved to amend his federal court complaint to add a separate and additional cause of action for fraud. (Appendix of Original Petition at 72a.) Allstate opposed the amendment, (Appendix 1a-7a), and the district court refused the amendment and thus denied the presentation of this additional cause of action in federal court. (Appendix of Original Petition at 39a.)

On March 24, 1992, Deus served both his original state court petition and an amended and supplemental state court petition. (Appendix of Original Petition at 76a.) The latter contained the fraud claim like that Deus had attempted to present in the district court. (Appendix of Original Petition at 76a.)

The district court subsequently disposed of Deus' claims against Allstate in Allstate's favor. (Appendix of Original Petition at 37a.) Deus appealed. While the appeal was pending, Allstate returned to federal district

court and obtained an injunction against the state court proceedings as to all Defendants on all claims (Appendix of Original Petition at 68a.) The district court's decision to enjoin the state court proceedings was thereafter made part of Deus' appeal to the fifth circuit.

The fifth circuit affirmed the district court's injunction against Deus' state court case to the extent it was directed to claims the district court had actually decided. However, the fifth circuit overturned the injunction as it applied to Deus' fraud claim. The fifth circuit reasoned that this Court's decision in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988), limited the district court's power to enjoin subsequent state court litigation to only those issues the district court actually decided. (Appendix of Original Petition at 33a.) On April 5, 1994, the fifth circuit denied Allstate's petition for rehearing on that issue.

ARGUMENT

Examination of the fifth circuit's ruling is limited to whether the trial court's injunction was permissible under the relitigation exception of the Anti-Injunction Act, 28 U.S.C. § 2283 ("Act"). Allstate misinterprets the fifth circuit's decision to reverse the district court's injunction of Deus' state court fraud claim. Contrary to Allstate's contentions, the fifth circuit did not reject the res judicata component of the Act. Neither did it disagree with the ninth circuit's decision in *Western Systems, Inc. v. Ulloa*, 958 F.2d 864 (9th Cir. 1992), *cert denied* __ U.S. __, 113 S.Ct. 970 (1993). And, finally, it correctly interpreted *Chick Kam Choo* by not concluding collateral estoppel precluded Deus from litigating his fraud claim in state court.

I. THE FIFTH CIRCUIT DID NOT REJECT THE RES JUDICATA COMPONENT OF THE RELITIGATION EXCEPTION OF THE ANTI-INJUNCTION ACT.

The issue before the fifth circuit was whether the district court could rely on the most expansive notion of res judicata to override the principles of federalism, comity and the constitutional independence of states, upon which congress based the Act, to support an injunction under the relitigation exception of the Act. The fifth circuit correctly acknowledged that this Court's decision in *Chick Kam Choo* limits injunctions under the relitigation exception to issues actually presented to, and decided by, the federal courts. The decision to reverse the district court's injunction of Deus' state court fraud claim did not violate the mandates of *Chick Kam Choo*. The fifth circuit

further acknowledged that those principles of res judicata which preclude litigation of claims a litigant could have brought, but did not, and which may be embodied in the relitigation exception, *Western Systems*, probably would have warranted an injunction if those were the circumstances of this case.

However, the fifth circuit found the principles of comity and federalism, the constitutional independence of the states and the strict and narrow limits imposed by congress on federal court injunctions of state court proceedings too compelling to ignore. On this basis, the lower court rejected an injunction grounded upon nothing more than the district court's discretionary refusal, without reason, of a viable claim Deus attempted to present by amending his complaint. While some authorities analyzing res judicata outside the context of the anti-injunction act have concluded that res judicata precludes subsequent litigation of claims rejected as untimely in earlier proceedings, (Restatement (Second) Judgments § 24(1)), the fifth circuit properly rejected this expansive view of res judicata as embodied in the relitigation exception of the act.

Virtually every decision of this Court addressing the limits of the exceptions to the Act have directed against any magnification of these exceptions. These exceptions "are narrow and are 'not [to] be enlarged by loose statutory construction.'" *Chick Kam Choo*, 486 U.S. at 146, *citing Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 287 (1970) and *Clothing Workers v. Richman Brothers Co.*, 348 U.S. 511, 514 (1955). Consequently, the fifth circuit's decision to reject the broadest possible view of res judicata as embodied within

the relitigation exception and to reverse the trial court's injunction was proper under any of this court's interpretations of the Act and its exceptions. Allstate's contention the fifth circuit misapplied *Chick Kam Choo* is therefore without merit.

II. THE FIFTH CIRCUIT'S DECISION IN THE INSTANT CASE DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT'S INTERPRETATION OF *CHICK KAM CHOO* AND THE SCOPE OF THE RELITIGATION EXCEPTION.

Equally deficient is Allstate's contention that the fifth circuit's decision conflicts with the decision of any other circuit which has addressed the scope of the relitigation exception. In *Western Systems*, the ninth circuit simply held a litigant's failure to raise a cause of action in federal court which he could have raised is grounds for a district court to rely on the res judicata component of the relitigation exception to enjoin litigation of that cause in state court. In the instant case, the fifth circuit noted that such "an injunction probably would have been warranted" had Deus not raised an additional cause when he attempted to amend his complaint. (Appendix of Original Petition at 33a.) Additionally, the fifth circuit's decision does not conflict with the decisions of the circuits which have strictly construed *Chick Kam Choo's* use of the phrase "actually have been decided". Because the district court denied Deus the opportunity to present the claim it necessarily did not render an actual decision on the merits of that claim. Hence, no conflicts among the circuits exist.

Allstate's attempt to inject confusion and conflict into the fifth circuit's application of the relitigation exception of the anti-injunction act through a distorted reading of that court's opinion is meritless. The fifth circuit has clearly remained within the confines of both congress' and this Court's mandates. Its decision to adhere to the principles of comity, federalism and the constitutional independence of the states in the face of a discretionary decision of a district court to reject an amendment to the pleadings stating a viable cause of action is beyond reproach. [1]

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[1] In spite of this Court's consistent and repeated emphasis on comity, federalism and the constitutional independence of the states, *Atlantic Coast Line* and *Chick Kam Choo*, Allstate has attempted to capitalize on alleged inadequacies in Louisiana law and "pitfalls" inherent the fifth circuit's interpretation of *Chick Kam Choo*. (Original Petition at 12-15.) This focus is misplaced and inconsistent with prior decisions of this Court. "The act absolutely prohibits in [actions which do not fall under an exception] all federal equitable intervention in a pending state court proceeding . . . regardless of how extraordinary the particular circumstances may be." *Mitchum v. Foster*, 407 U.S. 225, 229 (1972). Further, in construing and applying the Act, federal courts are not to be influenced by any assumption that the state courts will not protect federal rights. *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511 (1955).

III. ALLSTATE'S OPPOSITION TO DEUS' ATTEMPTED AMENDMENT EVIDENCES THE FACT OF THE DIFFERENCES BETWEEN THE FRAUD CLAIM AND THE CLAIMS THE DISTRICT COURT ACTUALLY DECIDED.

Further compromising Allstate's position before this Court is its opposition in the first instance to Deus' attempt to present his fraud claim to the district court. When Deus attempted to amend his complaint to include his claim for fraud Allstate objected on the grounds that Deus was adding "a new cause of action", (Appendix at 2a), "factually inconsistent" with his other claims. (Appendix at 6a.) Allstate further proclaimed prejudice on the basis that it was at that point near trial yet "at no time was [it] aware that it was facing an allegation of fraud, and therefore did not attempt to defend itself against an allegation of fraud."[2] (Appendix at 4a.) Now, before this Court Allstate attempts to present the state court fraud claim as so inextricably intertwined with the claims actually decided by the district court that an injunction should prevail. These inconsistent positions based plainly on Allstate's immediate interests are alone sufficient to deny Allstate's application.

Moreover, Allstate's opposition, which necessarily led to the district court's discretionary rejection of Deus'

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[2] In this regard, Allstate also accuses Deus of dilatory tactics. (Appendix at 1a-2a.) However, neither the fifth circuit nor the district court found that Deus was dilatory.

amending complaint, is the source of the dilemma it now faces and precludes any injunction because it prevented any opportunity for the district court to address the merits of the claim, together with whatever evidence which might have been presented in conjunction therewith. As gleaned by *Chick Kam Choo* from *Atlantic*, the precise state of the record must be considered together with what the judgment sought to be protected actually said before a proper determination can be made on whether an injunction can issue. *Chick Kam Choo*, 486 U.S. at 148. No argument of counsel, evidence or reasons of the court are available to determine what protection the courts should afford the judgment. Accordingly, injunctin is improper.

IV. COLLATERAL ESTOPPEL DOES NOT BAR LITIGATION OF DEUS' FRAUD CLAIM IN STATE COURT.

Finally, Allstate's claim that collateral estoppel precludes Deus from litigating his fraud claim in state court is likewise baseless. Allstate contends the issues the district court actually decided collaterally estop a finding of fraud by the state court. The record is devoid of any indication the district court granted the injunction based upon such a conclusion. Moreover, by denying Deus' amending complaint the district court denied itself the ability to review factors relative to Deus' fraud claim. Therefore, the district court could not consider what it actually decided in light of Deus' fraud claim and therefore could not conclude the former necessarily dictated collateral estoppel of the latter. Thus, the conclusion the district court did reach was without foundation.

CONCLUSION

For the reasons stated in this opposition, this Court should deny Allstate's petition.

Respectfully submitted,

Voorhies & Labbé
W. GERALD GAUDET #5971
JOHN CRAIG JONES # 17648
700 St. John Street
P.O. Box 3527
Lafayette, LA 70502
(318) 232-9700
Attorneys for
Voorhies & Labbé

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APPENDIX A

[Filed Jan. 21, 1992]

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

Civil Action No. 88-2099

FRANK D. DEUS

-vs-

ALLSTATE INSURANCE COMPANY

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S
MOTION FOR LEAVE TO FILE THIRD
SUPPLEMENTAL AND AMENDING PETITION
AND MOTION FOR SANCTIONS

MAY IT PLEASE THE COURT:

Allstate Insurance Company ("Allstate" or "defendant") opposes plaintiff's Motion for Leave to File Third Supplemental and Amending Petition [1] because plaintiff's proposed amendment is merely a tactical maneuver to attempt to sneak in an allegation of fraud, seven weeks prior to trial, when defendant has not been defending itself against any fraud allegations for the past three and one-half years. Additionally, the proposed allegations in plaintiff's third supplemental and amending petition cause undue prejudice to Allstate and could have been alleged months ago. Plaintiff seeks to add a new cause of action for fraud under La. C.C. Art. 1953, which is one of the conventional obligations articles dealing with "vices of consent." To prevail on a fraud claim under Article 1953, plaintiff must show by a preponderance of the evidence that defendant, Allstate, intended to defraud him at the confection of the contract and that plaintiff suffered actual pecuniary damages as a result. LSA-C.C. Art. 1953; *Pittman v. Piper*, 542 So. 2d 700, 702 (La. App. 4th Cir. 1989); *Home Indemnity Co., Inc. v. Boe*, 499 So. 2d 1301, 1302 (La. App. 4th Cir. 1986). See also *Haggerty v. March*, 480 So. 2d 1064, 1068 (La. App. 5th Cir. 1985).

This newly alleged cause of action would be subject to dismissal by summary judgment and/or under Federal Rule of Civil Procedure 12(b)(6) because even accepting all the allegations as true, there is no evidence or testimony that Allstate intended to defraud Deus at the

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[1] It is interesting that plaintiff has entitled this a supplemental and amending petition because it implies that he intends to supplement his original allegations with new causes of action.

time it formed the contract, or implemented its amendments and its policies regarding Peer Review analysis. The individuals alleged to have manipulated the peer groups are said to have done so in contravention of Allstate's established policies. Therefore there could be no fraud under the theory alleged in plaintiff's proposed amendment.

A claim pursuant to Article 1953 is nonsensical because Deus alleges defendant breached his contract, not that there was never a contract because fraud had vitiated plaintiff's consent. (See Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at p. 4); (Statement of Disputed Facts No. 12 and pps. 44, 47, 57, 59, 71 in which he argues this new cause of action for the first time.)

The amendment also seeks to add excess verbiage regarding plaintiff's allegation that defendant breached its contract and intentionally inflicted emotional distress which have already been alleged in earlier petitions. Furthermore, plaintiff admits in his memorandum in support that plaintiff "had previously alleged facts in his petition which would assert the commission of a fraud on plaintiff; however, in an abundance of caution, plaintiff would like to amend its petition." (See Plaintiff's Memorandum in Support of Motion for Leave to File Supplemental and Amending Petition at p. 3, a copy of which is attached hereto as Exhibit "A").

Rule 15(a) of the Federal Rules of Civil Procedure does not require this Court to allow the plaintiff to amend to add a new cause of action which is prejudicial when the

supporting factual allegations have already been raised in earlier petitions.

The Fifth Circuit has succinctly outlined the scope of the court's discretion when faced with a Motion for Leave to File and *[sic]* Amended Complaint:

> In exercising its discretion, the district court should consider several factors. Among these factors, the court may consider whether the amendment would cause undue delay in the proceedings, undue prejudice to the non-movant, and whether the movant is acting in bad faith.

Ross v. Houston Independent Schools District, 699 F.2d 218, 228 (5th Cir. 1983). Additionally, the district court should only allow an amendment which could not have been raised initially. See *Barrett v. Independent Order of Foresters*, 625 F.2d 73, 75 (5th Cir. 1980). In *Barrett*, the proposed amendment sought to add several new parties and additional counts. Even though the motion was not filed until nearly 10 months after the original complaint, there appeared to be no matters that appellant proposed to add which could not have been raised initially. Given those circumstances, the Fifth Circuit could not find that the trial judge abused his discretion in denying plaintiff's motion for leave to amend. *Id.* at 75.

Furthermore, in *Daly v. Sprague*, 675 F.2d 716 (5th Cir. 1982), the Fifth Circuit found that a district court did not abuse its discretion in denying an amended complaint which asserted new allegations that were not germane to the original action and which were filed 16 months after

the filing of the original complaint. *Id.* at 723. Here, Deus filed his original complaint in August, 1988, and his first and second supplemental and amending petitions on December 16, 1988 and May 25, 1989. Thus, this proposed third amendment comes more than three and one-half years since the original complaint was filed.

Defendant, Allstate, would be unduly prejudiced if plaintiff is granted leave to file a third supplemental and amending petition because more than nine depositions have been taken by plaintiff in this matter and at no time was defendant aware that it was facing an allegation of fraud, and therefore did not attempt to defend itself against an allegation of fraud.[2] Contrary to plaintiff's statement that the filing of this third supplemental and amending petition would not unduly delay this matter, defendant submits that it would be necessary to re-depose at least nine individuals in order to defend itself against this new allegation of fraud. This would certainly delay trial of this matter once more and be quite costly for both parties. Federal Rule of Civil Procedure 15(a) does not require this Court to allow an amendment seven weeks prior to the March 9, 1992 trial date of this matter. Plaintiff is attempting to harass defendant and cause unnecessary delay and to needlessly increase the costs of this litigation. The Fifth Circuit has upheld a refusal to allow amendment where the motion for leave to amend was filed 10 weeks before trial. *Harvey v. Andrist*, 754

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[2]In fact, defendant's first knowledge that plaintiff was alleging fraud was on January 10, 1992, when counsel received plaintiff's memorandum in opposition to Allstate's Motion for Summary Judgment.

F.2d 569, 571 n.1 (5th Cir. 1985), *cert denied* 471 U.S. 1126, 105 S.Ct. 2659, 86 L.Ed.2d 276 (1985). In this case, the trial date is March 9, 1992, which is less than 7 weeks away. Trial has already been postponed three times for various reasons.

Plaintiff argues that his whole basis for amending at this late date is as a result of the deposition of James Ivy, a former employee of Allstate whose employment was involuntarily terminated. [3] However, no new facts were discovered by Ivy's deposition which would support an allegation of fraud. Incidentally, Ivy was deposed on November 25, 1991 and yet plaintiff chose to wait until January 9, 1992 to file his motion for leave to amend.

Plaintiff's proposed Third Supplemental and Amending Petition is interposed to harass and cause unnecessary delay and to needlessly increase the costs of this litigation. Moreover, a cause of action under La. C.C. Art. 1953 would be subject to dismissal and is factually inconsistent with Deus' other contract complaints. Defendant therefore respectfully requests that this Court impose sanctions in accordance with Rule 11 of the Federal Rules of Civil Procedure against plaintiff and plaintiff's counsel as it deems fit, including a reasonable attorney's fee.

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[3]As plaintiff has brought to this Court's attention, Ivy is currently the plaintiff in a civil rights suit against Allstate which brightly illustrates his bias against Allstate in this matter. Therefore, Ivy's testimony should be afforded no weight.

For these reasons, Allstate respectfully requests that this Court deny plaintiff's Motion for Leave to File a Third Supplemental and Amending Petition and issue an order imposing sanctions against plaintiff and his counsel.

Respectfully submitted,

CHAFFE, MCCALL, PHILLIPS, TOLER AND SARPY
DONA J. DEW (#1329)
SKYE H. BANISTER (#19881)
23300 Energy Centre
1100 Poydras Street
New Orleans, LA 70163-2300
Telephone: (504) 585-7000

By: /s/ Skye H. Banister
SKYE H. BANISTER
Attorneys for Allstate
Insurance Company